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JOHN T. FEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1956

No. 856

COLUMBIA PICTURES CORPORATION,
Petitioner,

against

RICHARD STEPHENS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is submitted in opposition to the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (Clark, Ch. J., Frank and Lumbard, C. J. J.), entered February 5, 1957, unanimously affirming a judgment of the United States District Court for the Southern District of New York, entered April 5, 1956, after a trial before Murphy, D. J. and a jury awarding respondent the sum of $12,500 as compensatory damages in an action for libel upon a charge to the jury to which not a single exception was taken or request to charge was made by either appellant or respondent (ff. 34, 114, 339-42).*

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* Unless otherwise indicated "f" refers to folios in appellant's appendix and "R" to appellee's appendix; and Italics have been supplied.

Opinion Below

The opinion of the Court of Appeals is reported at 240 F. 2d 764 and set forth in appellant's petition (pp. 21-24). Appellant made no motion to the Court of Appeals for reargument or for a stay of its mandate.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The Questions Presented

(1) Is any question presented for review where in an action for libel, with jurisdiction based solely upon diversity of citizenship, the trial court following the law of the State of New York, where the libel was published, in its charge to the jury stated that to establish the defense of truth the facts proved in justification must substantiate all of the defamatory matter charged and left to the jury as issues of fact specifically whether respondent "misappropriated" the funds of defendant or had any "intent to frauduently deprive" appellant of such funds as charged in the libel, to which court's charge no exception was taken?

(2) Assuming appellant's position that the libelous matter charged respondent with the crime of larceny under the Penal Law of the State of New York did not appellant to sustain the plea of truth have the burden of proving felonious or larcenous intent on part of respondent to "misappropriate with the fraudulent intent to deprive" appellant of its funds as charged in the libel and was not the existence of any such intent a question of fact for the jury?

(3) Did not the trial court, as affirmed by the Court of Appeals, follow precisely the law of the State of New

York where it charged the jury that the proof of justification must be co-extensive with the libel; that to be so co-extensive defendant had to prove "misappropriation with intent to fraudulently deprive" appellant of its funds as charged in the libel and that such "misappropriation" and "intent to fraudulently deprive" were issues of fact for the jury?

(4) Were not the issues presented pure questions of fact to be determined by the jury?

The Statutes Involved

The statutes (28 U. S. C. 1652, New York Penal Law, Sections 1290, 1306) claimed by appellant to be involved are set forth in its petition (pp. 2, 3).

Statement of the Case

This is an action for libel with Federal jurisdiction based solely on diversity of citizenship under 28 U. S. C., Section 1332(a).

Two causes of action are each based upon sworn proof of loss filed by defendant with a surety company charging that specified moneys *"have been misappropriated"* by *plaintiff*, employed by defendant, *"with the intent to fraudulently deprive the said employer of the same"*; and the third, upon a letter of intent to file such proofs. Defendant's answer admits publication but pleads truth and conditional privilege (ff. 36-41, 61-80, 88-99).

The trial took about two weeks with about 1,500 pages of testimony and 200 exhibits. Not a single exception was taken to the trial court's charge nor any requests for further charges made by either party. The jury, on a stipulation authorizing one verdict, found for plaintiff. Judge Murphy denied from the bench defendant's motions to set aside the verdict and to dismiss the complaint (ff. 339-342). The Court of Appeals unanimously affirmed (240 F. 2d 764).

Brief Outline of Case

Plaintiff, an employee of defendant, upon his final accounting on his running expense account when he quit defendant's employ admittedly repeatedly asserted, prior to final payment to him, various claims against defendant for expenses and moneys due him resulting in a dispute as to the final amount due to plaintiff. Plaintiff and defendant then had an understanding that he would hold up payment of certain bills in prior expense vouchers pending the final disposition of his claims. Without apprising plaintiff of such disposition as it had promised, defendant falsely and fraudulently and with actual malice, filed without any notice to plaintiff, proofs of loss with a surety company charging him with "misappropriation with intent to fraudulently deprive" defendant of its funds, and representing to the surety company that he had asserted no claims whatsoever against defendant.

Based upon documentary proof and the sworn admissions by six of defendant's principal executives called by plaintiff as his own witnesses and upon the court's charge, to which no exception was taken, which specifically left to the jury as issues of fact the truth of the libel that plaintiff "misappropriated" funds "with fraudulent intent to deprive" defendant of such funds and defendant's actual malice in publishing the libel, and after defendant had its complete day in court with a trial lasting about two weeks, the jury found the libelous charge was false and published with actual malice.

Facts

On September 6, 1949, plaintiff who had previously worked for eight years at Warner Bros. Pictures Corporation where he had established a reputation for good character, personality and ability, was hired as a publicity man or "exploiteer" for defendant by Nathan Spingold, a vice-president of defendant, without the knowledge of any executives who were to supervise plaintiff and

assigned to Harry K. McWilliams ("McWilliams"), manager of the exploitation division. These supervisory employees, directly involved in the publication of the libels, resented this hiring over their heads and from the inception manifested an animus against plaintiff evidenced by a continuous campaign to have him fired for no reason except antipathy (S. M. 1-9, R. 3, 57, 94-95).

McWilliams assigned plaintiff to defendant's Boston office headed by Harry Rogovin ("Rogovin"). McWilliams admitted that he constantly complained to the other officers about plaintiff, particularly whenever he took instructions from Rogovin; Stephens protested these criticisms as unjustified; and McWilliams unsuccessfully tried repeatedly to have Stephens fired. The situation became so critical that Rogovin knowing the facts wrote to McWilliams and his superiors that Stephens had blamelessly acted on his instructions. McWilliams' harassments culminated on January 9, 1952 when he fired Stephens on the pretended ground of insubordination when the real reason was that Stephens had admittedly complained bitterly to McWilliams about his incompetency and antagonism (Ex. 103, R. 94, 117, S. M. 1217).

Stephens then convinced McWilliams' superiors, Howard LeSieur ("LeSieur") and Paul N. Lazarus ("Lazarus") that these complaints were merely a cover-up for McWilliams' own inefficiency, but this discharge was not rescinded for these superiors were not then prepared to re-arrange the exploitation office (Exs. 12, 13, R. 3-6). However, Rogovin, knowing this discharge was unjustified, interceded with Montague, one of defendant's top officers, and Lazarus yielding to Montague's request that he "reconsider", reinstated Stephens. The resentment of McWilliams, Lazarus and the other executives against Stephens was aggravated by his going over their heads to get his job back. McWilliams who directly participated in the preparation of the documents containing the libelous matter admitted his "unfriendly feelings" against Stephens (R. 51-52, 98).

Defendant in the proofs of loss swore not only that plaintiff had "misappropriated" funds "with intent to fraudulently deprive" defendant of such funds but "that there are no offsets whatsoever against said claim" (ff. 90, 99). The record is indisputable that plaintiff had not "misappropriated" any funds and had no "intent to fraudulently deprive" defendant of funds. On the contrary the record is clear that plaintiff had asserted prior to the filing of the proofs various *bona fide* claims and had a dispute with defendant on his final accounting and was, pursuant to an understanding with defendant merely holding up further payment of bills pending a disposition of his claims; and defendant, without any notice to plaintiff of such disposition, filed the charge of "misappropriation with fraudulent intent to deprive" with the surety company.

After his reinstatement, plaintiff was instructed by McWilliams to handle the personal appearance tour of two actresses with plaintiff to use his own automobile to transport them, their luggage and exploitation material. McWilliams wrote Stephens: "we have taken care of all insurance matters in connection with the ladies riding in your car." During this tour, youngsters attracted by these movie stars ruined plaintiff's car top. LeSieur admitted that Stephens informed him that the tour was "rough on him" and "his car". Although LeSieur agreed that defendant would pay for a new car top, plaintiff was never reimbursed for this item which was one of the claims asserted by him on his final accounting (Exs. 6, 7, 22, R. 7-10, 74).

A few weeks later, plaintiff while in New York en route to St. Louis pursuant to McWilliams' instructions, complained to Montague that this precipitous assignment was a continuation of McWilliams and Lazarus' campaign to compel him to resign, particularly since Columbia had other exploiteers in St. Louis, and that rather than be a party to such an act, he preferred to resign. Lazarus,

after being informed by Montague that he too did not see the necessity for sending plaintiff to St. Louis, accepted Stephens' resignation which took the form of a "voluntary discharge" on May 14, 1952 (R. 10-12, 52).

It is clear and in fact not disputed that plaintiff, at the time he quit defendant and repeatedly thereafter, asserted both orally and in writing, claims against defendant aggregating $465. Plaintiff on the day he quit submitted his last expense voucher. Clifton O. Slenker, defendant's business manager, deleted from this voucher items totaling $53.15 and admitted Stephens then objected to this deletion (Ex. 30, R. 108, 14, 71-2). On May 18, 1952, four days after leaving Columbia and prior to the filing of the proofs of loss, plaintiff admitted and wrote to Slenker:

> "* * * therefore I am requesting payments for the following: $250.00 vacation pay; 53.15 monies in full expenses submitted thru 5/14; 96.00 for new car top which was ruined on Barbara Hale tour; 67.50 half months rent which was paid to Copley Plaza Hotel; $466.65 Balance due me. * * *" (Ex. 32)

Slenker did not produce this letter, testifying that all his records as business manager were destroyed a few weeks after plaintiff quit.

On May 18, 1952, Stephens admittedly also wrote to Montague asserting a claim against defendant. Lazarus was forced to admit that he knew plaintiff had asserted all these claims when he left the company. LeSieur admitted that plaintiff asserted all of these claims at the time of quitting; he continued to discuss these claims with plaintiff during June, July, August 1952 prior to the filing of the proofs of loss; and he had been informed by plaintiff that he was holding up further payment of bills. McWilliams who helped prepare the proofs admitted he knew of each of these claims. Weber, defendant's insurance man, who physically prepared the proofs had to

admit that Slenker had told him before plaintiff left Columbia's employ of a claim for damage to his car (Ex. 31, R. 49-50, 68-75, 88, 108).

Defendant knew that plaintiff asserted these claims; that a *bona fide* dispute existed as to the final accounting; that plaintiff was holding up payment of bills pending final accounting and defendant promised to dispose of these claims. Yet, defendant without admittedly ever informing plaintiff that his claims were rejected or the proofs were to be filed charged plaintiff with "misappropriation with fraudulent intent to deprive" and averred that plaintiff had been "paid in full" and "had not asserted any claims" (R. 16, 39-42, 76, f. 144). McWilliams and LeSieur admitted that never before had there been any question as to plaintiff's honesty or as to even a single item on his vouchers (R. 72, 100).

Stephens in his job continuously expended his own funds or incurred bills usually on his credit with "vendors" for innumerable items and then submitted weekly expense vouchers, receiving reimbursement about two weeks later, so that Columbia was always indebted to him on his running account with all funds commingled and used to pay indiscriminately the current and past obligations to vendors including the exploiteer when he was a "vendor". The funds received on vouchers were not and could not be "ear-marked" so as to apply specific funds to specific bills (R. 18-21, 34-40).

Defendant charged in its proof of loss specific bills totalling $291.26 as having been fraudulently misappropriated by plaintiff. The facts as to these items also clearly negative any "misappropriation" or "intent to fraudulently deprive" and clearly establish that defendant knowingly included items for which plaintiff never received funds. Defendant included an item of $4.59 for the Waterville Sentinel Journal. Shortly before quitting Columbia, plaintiff received from defendant about $5,000 on vouchers including this Waterville bill. Plaintiff, as

defendant knew, paid prior to and after quitting its employ all the vouchers except this $4.59 (Ex. 36, R. 19). The jury refused to believe plaintiff had misappropriated this $4.59 with intent to fraudulently deprive the defendant of these funds. As to the Copley Plaza and Fay Foto bills aggregating $218.83, about two weeks after leaving defendant, plaintiff received a check in that amount from defendant. One would assume from the proofs of loss that plaintiff then pocketed this money and absconded. The fact is, however, immediately upon receipt plaintiff personally paid the funds of this check plus $13.51 to Columbia as "vendor" which payment was known to defendant prior to filing its proofs (R. 17, 39-41, Ex. 35). The item of Automobile Livery Service, Inc. of $25 was included although plaintiff had incurred and paid this bill six months before he quit and defendant admittedly never checked with him. Telephone bills aggregating $43.44 were included as funds actually paid to plaintiff. Defendant's answer admitted the falsity of this charge by alleging that part of this item was never paid to plaintiff but was an alleged debt for personal telephone calls (ff. 71-75).

In answering a surety company inquiry whether Columbia contacted plaintiff and his reply on the unpaid bills, defendant suppressed the facts of plaintiff's assertion of his claims and of the understanding to hold up payment and falsely stated: "Stephens was confronted with the unpaid bills but since he was annoyed because of his dismissal he has so far paid no attention to us" (R. 60-4, Exs. 53, 54, R. 114.5). Plaintiff was never "confronted" nor was he annoyed over his "dismissal" because he, in fact, had resigned.

In addition, when requested by the surety company for plaintiff's last known address, defendant fraudulently concealed this address and claimed it did not know plaintiff's whereabouts. The invariable practice of the surety company is to strive to locate an employee so he could

offer his defenses before an *ex parte* determination that he was guilty of wrongdoing. Ofttimes the alleged fraudulent misappropriation may, as in the case at bar, merely be a justified withholding of payment because of offsets and the claim, therefore, not covered by the fidelity bond. The proof of loss, therefore, requires the sworn statement that no claims whatsoever have been asserted by the employee against the employer.

The surety asked Columbia for "the last known address of the principal so that the company might endeavor to contact him." Defendant's reply it did not know plaintiff's last address was patently false since plaintiff gave his address of 237 Independence Drive, Boston to LeSieur who promised to write him about his claims (Ex. 83, 86, R. 45, 114, S. M. 559-60). LeSieur and McWilliams unequivocally swore they first heard the address "237 Independence Drive" was when Stephens testified in the courtroom. LeSieur was compelled to admit that he had written "237 Independence Drive" on a memo dated August 13, 1952 (prior to the filing of the proofs); and he gave that memo to McWilliams (Ex. 82, R. 75-6, 93, 99, 117). This memo established that defendant had promised but failed to write to plaintiff on the disposition of the claims and concealed this fact from the surety company. McWilliams testified his records in the exploitation office, just like Slenker's in the business office, had been destroyed soon after plaintiff quit Columbia (R. 92-3).

ARGUMENT

I

The libel charges plaintiff "misappropriated" funds "with the intent to fraudulently deprive" defendant of such funds. Proof of the plea of truth must be as broad as the specific charge made. Defendant had to establish the "misappropriation" and the "intent to fraudulently deprive" which were the vital elements of the libel.

The complaint alleges and defendant's answer admits that it filed two proofs of loss containing the sworn statement:

> "that the moneys * * * have been misappropriated by the said Employee with the intent to fraudulently deprive the said Employer of same."
>
> * * * * *
>
> "Further, that there are no offsets whatever against said claim for salary, commissions, cash or other deposits except as set forth particularly on the above statement" (ff. 85-94, 95-100).

The gravamen of the libel is clear and simple—"misappropriation" of funds "with the intent to fraudulently deprive" defendant of such funds. The position of the trial court, sustained by the Court of Appeals, was that the libel having charged "misappropriation" and "intent to fraudulently deprive", defendant must prove these elements under a defense of truth and the issue of fact as to the truth of these elements were questions of fact for the jury.

That a defendant who destroys the reputation of another and seeks to avoid liability on the ground of truth has the burden of establishing with exactitude every element of the precise charge made was recently reiterated in *Crane* v. *New York World-Telegram,* 308 N. Y. 470 (1955) where defendants published of plaintiff: "John

Crane, former president of the UFA now under indictment, * * *." The court, discussing facts pleaded in justification as a complete defense, stated:

> "A plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge therein made. See, e.g., White *v.* Barry, 288 N. Y. 37, 39; Fleckenstein *v.* Friedman, 266 N. Y. 19, 23; see, also, Seelman on The Law of Libel and Slander (1933), §171, p. 146. It is one thing to say that a person has been accused by his colleagues and, without waiving immunity, has testified before a grand jury to criminal activities, and quite another thing to say that an indictment has been brought against him by a grand jury. See Jones, Varnum & Co. *v.* Townsend's Administratrix, supra, 21 Fla. 431, 440. The former charge may be a serious blot upon reputation, but the latter says, in a practical and a moral sense, much more, for it announces that an actual criminal prosecution has been brought against him; that he must stand trial and may be found guilty and sentenced to a prison term."

The court held even the partial defense insufficient (p. 477):

> "But, of necessity, the facts that go to make up a partial defense in mitigation and reduction must *tend to prove the truth of the precise charge* made by the publication. See, e.g., Gressman *v.* Morning Journal Ass'n, supra, 197 N. Y. 474; Lanpher *v.* Clark, supra, 149 N. Y. 472.
>
> "In the case before us, however, the facts alleged are entirely unrelated to the truth of the charge that plaintiff had been indicted; they tend at most to prove that plaintiff had engaged in criminal activity and had been accused of wrong-doing by his fellow firemen."

The court approved *Levey* v. *New York Evening Journal,* 237 App. Div. 255, holding that the defense that plaintiff was being *"investigated by the Attorney-General"* was insufficient as a partial defense to a libel charging plaintiff had committed a crime and had been *"arrested by the district attorney's office."*

The charge of the trial court in the case at bar requiring defendant to prove truth of the charge of the "misappropriation" and the "intent to fraudulently deprive" defendant of funds and that such truth was an issue of fact for the jury and its approval by the Court of Appeals in the instant case was precisely correct and in complete accord with the laws of the State of New York and of all other jurisdictions. The trial court following the *Crane* case, *supra*, and *Fleckenstein* v. *Friedman*, 266 N. Y. 19 (cited in the *Crane* case, *supra*) charged the jury to which no exception was taken:

> "Now, a plea of truth as justification for a libelous statement must be as broad as the libel and must establish the truth of the precise charge therein made. There is a trite but accurate saying among lawyers that truth is a perfect defense, but it must be the whole truth, not partly true or almost true. * * * If the statement is true, it is a complete defense, no matter what reason or emotion prompted it."

The trial court then discussing the elements of "misappropriation" and "fraudulent intent" charged the jury to which no exception was taken:

> "So your first issue of fact in connection with the defenses is: Were the statements in the proof of loss true? Now, words charged to be defamatory are to be taken in their natural meaning and construed as persons generally understand them and according to their ordinary meaning. Webster defines 'misappropriate' as follows: To appropriate wrongly or misapply in use, especially wrongfully and for one's self. 'Fraudulently' is defined as: Using fraud; trickery; deceitful. 'Intent' is defined as 'an intending or purpose; also that which is intended or purposed; the intent and meaning of the devisor, hence design, purpose.'"
>
> * * * * *
>
> "If you find that the statements made in the proofs of loss and in the letter, if you find the letter to be libelous, were in fact true, that is the end of the case and your verdict must be for the defendant."

The trial court in its charge then discussed without any exception in detail the evidence as to plaintiff's "fraudulent intent" informing the jury to consider plaintiff's non-payment of the bills, his discussions and understanding about his claims and holding up payment, the period of time that had elapsed, and "all acts and circumstances from which you can draw an inference as to his intention" and based upon the overwhelming evidence the jury found that plaintiff had not misappropriated any funds and had no intent to fraudulently deprive defendant of its funds.

II

It is basic law of New York and every common law jurisdiction that in civil actions as well as criminal actions, to establish a charge of "misappropriation with fraudulent intent", larceny or other criminal or wrongful conduct, such fraudulent, larcenous, criminal or other wrongful intent must not only be proven but is a question of fact for the jury and not a presumption or inference of law.

There is absolutely no merit to defendant's petition for certiorari. Defendant does not even remotely claim that there are any constitutional questions, conflict of decisions of Courts of Appeals of various circuits or federal questions involved. The only issue presented was a pure question of fact as to the truth of defendant's libel that plaintiff misappropriated funds with a fraudulent intent. It is not contended that the court committed error in its charge that the defense of truth must be co-extensive with the libel. No exception to the charge was taken and, therefore, no question as to the correctness of the legal principles expounded in the charge was raised at the trial. Defendant is futilely attempting to raise an issue of law where none exists.

Appellant urges that the libelous statement that plaintiff "misappropriated" funds with the intent to fraudu-

lently deprive defendant of such funds constituted a specific charge of larceny under Penal Law, Section 1290:

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, * * *, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner * * * any money, * * *, or article of value of any kind, steals such property and is guilty of larceny."

It is manifest that to establish a crime or larceny under that section the specific intent prescribed therein—the intent to deprive or defraud another of his property—must be established. The intent imputed to plaintiff in the instant libel was similar to the intent established to prove larceny—the intent to fraudulently deprive. This question of this intent was specifically left to the jury which not only found such intent did not exist and but that plaintiff had no larcenous, criminal, fraudulent or other wrongful intent. Yet, defendant argues in direct conflict with the specific language of the Penal Law, Section 1290, and the universal and invariable holdings of the decisions of the State of New York and of every other common law jurisdiction that proof of such intent is not required; and if required, such intent is not a question of fact for the jury.

Defendant asserts that, even though plaintiff had no felonious intent or intent to fraudulently deprive and merely held up payment of the bills pursuant to an understanding pending the disposition on a final accounting of his *bona fide* claims, plaintiff was guilty of larceny by reason of the last sentence of Penal Law, Section 1306.

These contentions that a charge of larceny can be established without proof of criminal intent or that Penal Law, Section 1306 eliminates from Penal Law, Section 1290 the specific requirement of a criminal intent has invariably been rejected.

The latest pronouncement is the comprehensive opinion in *Morissette* v. *United States*, 342 U. S. 246 (1952), which analyzed and discussed in detail the decisions and statutes of all common jurisdictions, particularly federal and New York, including Penal Law, Sections 1290 and 1306, and completely rejects appellant's position the court held unequivocally that the *sine qua non* of larceny-type offenses is criminal intent and the existence of criminal intent is a question of fact for the jury.

Defendant Morissette who took some spent bomb casings rusting away in a heap on a United States air force bombing range was convicted for a violation of 18 U. S. C., Section 641 providing: "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. The trial court would not permit defendant to show "this man thought it was abandoned" or to submit to the jury whether he acted with innocent intention and charged: "The question on intent is whether or not he intended to take the property. He says he did. Therefore if you believe either side, he is guilty." Counsel contended, "But the taking must have been with a felonious intent" but the court ruled: "That is presumed by his own act."

This learned court stated (pp. 250, *et seq.*):

> "The contention that any injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. • • • Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will'"
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> • • • • •
>
> "Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to law that

existed before legislation; * * *, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is '* * * as bad a word as you can give to man or thing.' State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. If any state has deviated, the exception has neither been called to our attention nor disclosed by our research."

"Nor do exhaustive studies of state court cases disclose any well-considered decisions applying the doctrine of crime without intent to such enacted common-law offenses, although a few deviations are notable as illustrative of the danger inherent in the Government's contentions here."

The court, discussing the necessity of proving a criminal intent even as to the offense "knowingly to convert" stated (pp. 263, 270):

"* * * Congress, by the language of this section, has been at pains to incriminate only 'knowing' conversions. * * * Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. * * * Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to *take away from one* in lawful possession without right *with the intention to* keep wrongfully.' (Italics added.) *Irving Trust Co.* v. *Leff*, 253 N. Y. 359, 364."

Similarly, *People* v. *Brofman*, 247 App. Div. 987 (1st Dept., 1948)[1] reversed a conviction of grant larceny under Penal Law, Section 1290, and completely repudiates appellant's position that Penal Law, Section 1306 eliminates the necessity for proving criminal intent or that such intent is an inference of law and not a question of fact for the jury. Brofman, a fur salesman, sold a fur coat and received but did not turn over to his employer

1. The facts are not set out in detail in the opinion and the recital herein is taken from the record on appeal.

the proceeds, claiming that he told the employer he was holding up the money until after an accounting on his claimed commissions. The trial court after stating defendant admitted he did not turn over the money but was holding it until commissions due him were determined stated: "I charge you as a matter of law, if you believe the defendant did that he committed the crime of grand larceny in the first degree." The court refused the quest of defendant's counsel to charge:

> "That a felonious intent to deprive or defraud another of his property, for his own use is a necessary element of the crime of larceny and that unless the jury found in this case that at the time defendant refused to turn over the $625 for the coat he was acting with such felonious intent, they may find him not guilty."

The *People's* brief in the *Brofman* case relying upon the same arguments, decisions and Section 1306 of the Penal Law, precisely similar to those of Columbia's in the case at bar urged:

> "The evidence adduced by the People established that defendant sold a fur coat for his employer and converted the $625 proceeds to his own use. Defendant, far from disputing the prosecution's case, specifically confirmed it when he testified that he used the $625 for his 'own purposes'. The explanation he offered—that he appropriated the money as an offset against unpaid commissions—was not only insufficient in law."

The *People's* brief cited Section 1306, Penal Law, and the identical cases quoted and relied upon exclusively by appellant to establish its contention that Section 1306 eliminated the necessity for proving felonious or fraudulent intent in larceny cases in the State of New York which cases will be disscussed in detail hereafter.

Brofman contended on appeal:

> "To sustain a larceny charge a 'felonious intent', an 'intent to steal' must be established and is an issue of fact for the jury; that Penal Law, §1306 did not elim-

inate the necessity of proving felonious intent in larceny, merely because the taking may have been done to offset a claim by the take against the owner; all the circumstances surrounding the refusal to turn over the funds must be considered by the jury in determining whether there is a felonious intent; and the last sentence of Penal Law, §1306 must be read together with Penal Law, §1290 which defines larceny as 'a person who, with intent to deprive or defraud another etc.,' thereby making felonious intent a necessary element in any larceny."

Some of the decisions relied on by *Brofman* to sustain these contentions of necessity to prove criminal intent are set forth.

McCourt v. *People,* 64 N. Y. 583, 586:

"'• • • Every taking by one person of the personal property of another, without his consent, is not a larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. • • •."

People ex rel. Perkins v. *Moss,* 187 N. Y. 410, 420:

"'• • • The charge of stealing property is only substantiated by establishing the felonious intent. Without it there is no crime; for it would be a bare trespass. It is the criminal mind and purpose going with the act, which distinguishes the criminal trespass from a mere civil injury."

People v. *Levan,* 295 N. Y. 26, 33, 34:

"'• • • The gist of larceny is the taking and carrying away of personal property of another *with the specific intent to steal* such property (Penal Law, Sec. 1290).'" (Emphasis by court.)

People v. *Koerber,* 244 N. Y. 147; *People* v. *Will,* 289 N. Y. 413, and *People* v. *Flack,* 125 N. Y. 324, holding there can be no larceny without intent to steal which is an issue for the jury.

Eatman v. *The State,* 48 Fla. 21, where a refusal to charge if defendant honestly believed he had the right to use funds, collected for his employer, he would not be guilty of embezzlement, was reversible error:

"* * * The refused charges are upon the theory that if the defendant in good faith believed he had a right to use collections made by him and did in such good faith and without secrecy or concealment use them, however mistaken or frivolous or ill founded his claim of right might in fact be, if he honestly entertained such a belief he would not be guilty."

People v. *Eastman,* 77 Cal. Rep. 171, where a conviction of larceny of a mare pledged by defendant for a debt was reversed because trial court refused to allow him to prove pledgee owed him wages:

"* * * For if the defendant had taken the mare off under the honest belief that he had a right to do it, in view of the fact that he might, in good faith, have considered his unpaid claim for wages to have been sufficient to have reimbursed McClure for the amount due him on the pledge, the jury would have been warranted in believing that the intention to steal was absent. * * *"

People v. *Klinger,* 165 Misc. 634, 636:

"* * * Whether the claimed setoff is an honest one, made under a firm belief of rightful title, even though a mistaken notion of the law, presents a question of fact."

The court in the *Brofman* case, 247 App. Div. 987, *supra,* repelled the *People's* contention, similar to Columbia's, and reversed the conviction, held that Penal Law, Section 1306, did not eliminate necessity for establishing felonious intent and that such intent was an issue for the jury, stating:

"Although the trial court left the question of felonious intent to the jury, the effect of the charge as given was to advise the jury that criminal intent had been established as a matter of law. This was error requiring

reversal and a new trial in this case. McKenna *v.* People, 81 N. Y. 360. As was said in People *v.* Flack, 125 N. Y. 324, 334, 11 L.R.A. 807:

'However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. * * *' "

The court further indicated that claims asserted in good faith might be a defense under Penal Law, §1306:

"The point is made in the appellant's brief that he would be entitled to an acquittal if the jury found that he mistakenly, but in good faith, believed that he had a right to hold the $625 in question until paid the commissions allegedly owing by his employer. See Penal Law, §1306.

It is a sufficient answer to this contention that no request for a charge to this effect was made on the trial. For reasons which we deem adequate we find it unnecessary to discuss the question further at this time."

The criminal intent or "intent to fraudulently deprive" is an indispensable element which must be found to exist by the jury in civil actions, particularly on fidelity bonds based upon charge of fraudulent intent or larceny. The leading case is *World Exchange Bank* v. *Commercial Casualty Ins. Co.*, 255 N. Y. 1 (1930), where plaintiff sued by reason of the acts of its bank teller on a bond indemnifying against "any loss through any dishonest or criminal acts." The court stating "embezzlement or larceny" is a "term or art" held:

"*Criminal the act was not, unless done with criminal intent.* People *v.* Flack, 125 N. Y. 324, 11 L.R.A. 807; People *v.* Wiman, 148 N. Y. 29." (Court's Italics.)

See *Van Schaick, Superintendent, etc.* v. *Fidelity & Casualty Co.*, 152 Misc. 449, action on fidelity bond where court followed *World Exchange* case.

Commercial Banking Corp. v. *Indemnity Insurance Co.*, 1 F.R.D. 380, action by employer on a fidelity bond where

the court, relying upon the *World Exchange* case, held surety company to establish absence of larcenous, dishonest or other wrongful intent in withholding funds collected may plead that agent had asserted claims in excess of such funds.

Appellant's contention that plaintiff's intent was criminal as a matter of law is repugnant to the fundamental laws of New York and of every common law jurisdiction and is in conflict with the very authorities cited by appellant. In the *Morissette* case, *supra,* which treats in detail with the New York cases and Penal Law, Sections 1290 and 1306, this learned Court discussing the ruling of the trial court that defendant's felonious intent was "presumed by his own act" of taking the property stated at (pp. 275-276):

> "Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property.' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with the defendant's testimony and all the surrounding circumstances."

The cases and arguments particularly those based upon Sections 1290 and 1306 of the Penal Law, relied upon by appellant, as has been indicated, were specifically relied upon by the *People* in the *Brofman* case, *supra,* where the court completely repudiated the position that Section 1306 eliminates the necessity for establishing a fraudulent or criminal intent and specifically held that this intent be established and is a question of fact for the jury.

In *J. W. Matthews & Co.* v. *Employers' Liability Assur. Corp., Ltd.,* 127 App. Div. 195, the trier of the facts, the

referee, specifically found as a fact that the employee had a felonious intent:

> *"the plaintiff did not owe the employee the amount he so retained, but only $95.05, and that his claim that it was owing to him was not made in good faith, but with intent to avoid payment to the plaintiff of certain sums he owed it."*

In the case at bar, the trier of the facts, the jury found that plaintiff had no felonious intent, no intent to fraudulently deprive, no intent to misappropriate; his claims were asserted in good faith and not with the intent to avoid payment; a *bona fide* dispute existed between the parties on the final accounting; and payment was being held up pursuant to an understanding betwen the parties.

The *Graves* v. *Kaltenbach & Stephens, Inc.*, 205 App. Div. 110, was an action for wrongful discharge where the defenses were "hiring at will" and "justification for the discharge." In essence, the Appellate Division merely held that a failure to turn over funds was justification for discharging an employee even though he asserted *bona fide* claims, since no felonious intent is required and a technical conversion would suffice. *In addition, most vitally, Columbia omits to state that the Court of Appeals specifically refused to affirm on the ground that the discharge was justified.* The court, after stating that the answer pleads that plaintiff had received moneys from defendant in a fiduciary capacity, namely, for payment to other of defendant's employees but which plaintiff instead retained and appropriated, held:

> "Per Curiam. Judgment affirmed, with costs on the ground that the contract of hiring was one at will.
>
> Hiscock, C. J., and Hogan, Cardozo, Pound, Crane, and Andrews, JJ., concur.
>
> McLaughlin, J., votes to affirm, also, on ground that discharge was proper."

In *Greene* v. *Frankhauser*, 137 App. Div. 124, where a new trial was granted because the charge on the question of intent was ambiguous, the court specifically stated:

"Of course, it is well settled that there must be a criminal intent in order to constitute a crime, but the criminal intent is the doing of the act prohibited with the intent specified in the statute."

* * * * *

"It may well be that if the plaintiff had the lawful possession of the automobile, and erroneously, but in good faith, asserted ownership or a lien thereon, the provisions of this section would relieve him of the charge of larceny in detailing the property; * * *."

The "intent specified in the statute" was the "intent to fraudulently deprive" a person of his property and in the instant case this specific intent was left by the trial court to the jury and no exception was taken.

In *Burlinghame* v. *Sun Printing & Publishing Ass'n*, 274 App. Div. 894, the court simply held that as a matter of "pleading", a defense of justification that plaintiff took large sums of money from the corporation without "legal authorization" was sufficient to put into issue the legality of the taking and which, of course, would be a question of fact for the jury under proper instructions of the trial court.

Similarly, in 13 A.L.R. 142, relied upon by appellant, the annotation stated p. 142:

"The general rule laid down by the authorities is that one who openly and avowedly takes the property of another without the latter's consent in settlement or as security for a debt bona fide claimed to be due him by the owner of the property is, no matter what the offense may be, at least not guilty of larceny or embezzlement. The basis of the decisions is the lack of intent to defraud, which is the essence of the crime. It is otherwise, however, where there is lack of good faith in asserting a debt, or where there is evidence tending to show a felonious intent in the taking of the property."

In support thereof, the annotation cites *People* v. *Hopkins*, 126 App. Div. 843 (1908) holding that an agent is not guilty of larceny in withholding funds collected for em-

ployer if he, in good faith, retained such funds because of his failure to receive from the employer the moneys claimed to be due.

III

The issue of the truth of the charge of misappropriation with intent to fraudulently deprive was a question of fact for the jury which was correctly presented in a charge precisely in accordance with the laws of the State of New York and to which no exception was taken.

The issue of the existence of the fraudulent, criminal or larcenous intent in a charge of fraudulent misappropriation or of any charge of larcenous act is under the laws of the State of New York and of every other jurisdiction a question of fact peculiarly within the province of the jury. In the *Morissette* case, *supra,* this learned Court stated:

> "State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reasons are well stated by Judge Andrews in *People* v. *Flack*, 125 N. Y. 324, 334:
>
> > 'It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. * * * However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.'"

Similarly, in a civil action on a fidelity bond indemnifying against "dishonest or criminal acts", the court in *World Exchange* v. *Commercial Insurance Co., supra,* stated: "if this standard is to govern, we think the quality of the teller's act is for the triers of the facts." In *First Nat. Bank* v. *National Surety Co.,* 243 N. Y. 34, action on fidelity bond, the court held it was error to

take from the jury the issue of the cashier's "intent" (p. 40): "and that it was error to instruct the jury or leave them to believe * * * the purpose for which such overdraft was permitted could not be explained or excused."

Furthermore, the law conscious of the consequences to employees of filing claims under fidelity bonds and that a criminal or other wrongful intent is an indispensable element to be established on a proof of loss has uniformly held the employer is not duty-bound, in fact, is duty-bound to the employee not to give "notice of any acts which may constitute the basis for a loss" unless there is a criminal intent and until an employer has actual knowledge of such criminal intent.

American Surety Co. v. *Pauly,* 170 U. S. 133, 147:

"it may well be held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty."

In *Hunt* v. *Fidelity & Deposit Co.,* 92 F. 2d 75, 77:

"* * * one must exercise great care and have positive evidence of embezzlement before he makes a formal charge and gives notice thereof."

United States Fidelity v. *Walker,* 248 F. 42, 43:

"provisions as to giving notice are not to be construed as to require action by the bank when it was not so far informed of the conduct of its cashier and of the intent accompanying that conduct as to be aware that he was guilty of what amounted to larceny or embezzlement." (Citing cases.)

Any claim of merit for the instant petition is completely negatived by *DeRonde* v. *Gaytime Shops, Inc.,* 239 F. 2d 735 (C.A. 2 Cir.) (Dec. 7, 1956), where the court (Medina, Lumbard and Waterman, C. JJ.) unanimously affirmed a jury's verdict on a trial before Judge Leibell.

In the *DeRonde* case, plaintiff sued for libel on a statement in a proof of claim identical with the instant libel, that plaintiff had "misappropriated" funds with the "intent to fraudulently deprive" defendant, his employer, of these funds. Plaintiff had stopped payment on his personal check cashed by defendant after a dispute on a claim for reimbursement of expenses asserted by plaintiff against defendant. The court stated p. 738:

> "The charge contained in the proof of loss embraced the crime of embezzlement, and under the law of Pennsylvania, where the act occurred, embezzlement requires a criminal intent. *Commonwealth* v. *Irvine,* 125 Pa. Super. Ct. 606 (1937). The existence or non-existence of such a criminal intent was, in this case, a question of fact for the jury."

The criminal intent, the existence or non-existence of which was held to be a question of fact for the jury was, of course, identical to the intent in the instant case—fraudulent misappropriation. In its main and reply briefs, Columbia contended to establish the defense of truth to a charge of fraudulent misappropriation, proof of fraudulent or criminal intent was not required. After the *DeRonde* decision was handed down, Columbia submitted to the Court of Appeals a lengthy memorandum which in essence repudiated this position and attempted to distinguish the *DeRonde* case from the case at bar on the ground that on a charge of larceny proof of felonious intent was required in Pennsylvania but not in the State of New York. The Court of Appeals rejected this contention and held Columbia, having specifically charged an intent to defraud, has to prove this intent to defraud, the existence of which was a question of fact for the jury. This proof of existence was required whether the libel was considered to be a charge of larceny under Section 1290 of the New York Penal Law, which requires specifically the existence of an "intent to defraud", and which intent is not eliminated by Section 1306 or whether not deemed to be a charge of larceny since the libelous mat-

ter specifically imputed this "fraudulent intent" to plaintiff. Similarly, this learned Court in the *Morissette* case, *supra,* in substantiation of the universal rule requires proof of a felonious intent which is a question of fact for the jury to sustain a charge imputing a criminal intent, especially applicable to Pennsylvania and New York, cited, among numerous decisions from various jurisdictions, *Thomas* v. *Kessler,* 334 Pa. 7, *People* v. *Will,* 289 N. Y. 413 and *Van Vechten* v. *American Eagle Fire Ins. Co.,* 239 N. Y. 303 (an action on an indemnity bond where the court stated certain acts "would not constitute a larceny, since there was lacking the felonious intent to appropriate another's property permanently and wholly.")

Any claim of appellant to the contrary, Judge Murphy and the Court of Appeals imposed upon defendant the precise burden defendant knowingly and voluntarily assumed when it filed, as found by the jury, with actual malice, personal ill-will to and in complete reckless disregard of plaintiff's rights a sworn statement to become a permanent part of the files of a bonding company containing the libelous *per se* charge that he, an employee, had misappropriated funds with the intent to fraudulently deprive defendant, his employer, of such funds. The court merely required defendant to establish the truth of the charge that plaintiff misappropriated funds with such fraudulent intent.

The concluding language of this learned Court in the *Morissette* case, *supra,* is specifically appropriate:

> "Had the jury convicted on proper instructions it would be the end of the matter. * * * They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter. Reversed."

Appellant's argument that the instant case would make the value of fidelity bonds illusory is baseless. A claimant on a bond is completely protected provided he does not

knowingly file a fraudulent claim or even if the claim is false does not do it with actual malice. Appellant is actually urging this learned Court to hold contrary to the most fundamental principles of the law of defamation that claims filed under fidelity bonds are absolutely, unqualifiedly and unconditionally privileged. Such a decision would be tantamount to holding that a claimant merely by the payment of a premium could with complete impunity permanently ruin the reputation of his employee in order to collect a fraudulent claim knowing it to be fraudulent or file such a false claim with personal ill-will against an employee.

The complete answer to appellant's position is *Andrews* v. *Gardiner,* 224 N. Y. 440, where the court following the time honored rule of law that absolute privilege is confined exclusively to judicial proceedings and then only as to matters that are relevant refused to hold that slanderous statements made at a hearing for parole before the Governor were unconditionally privileged stating (p. 448):

> "While a convict and counsel act in good faith, they are immune; the privilege is lost when they defame with malice. There is no license, under cover of such an occasion, to publish charges known to be false or put forward for revenge."

The employer is protected provided he does not act with malice—fraudulently or in bad faith—and the burden or proving such malice is on plaintiff. The jury, in the case at bar, found that appellant filed false charges known to it to be false to collect on claims not covered by the bond and were filed with personal ill-will and actual malice toward plaintiff.

Similarly, appellant is completely in error when it asserts that had this action been instituted in the courts of the State of New York, it could have appealed to the New York Court of Appeals as a matter of right. Under

the New York Civil Practice Act, Sections 588 and 589, where a judgment for damages is unanimously affirmed by the Appellate Division, appellant may not appeal to the Court of Appeals as a matter of right but is required to obtain leave from the Court of Appeals to appeal which is granted only upon a showing that question of law is involved which ought to be reviewed.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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DAVID SCHENKER,
of Counsel.

APR 23 1957
JOHN T. FEY, C

Supreme Court of the United States

October Term 1956

No. 856

COLUMBIA PICTURES CORPORATION,

Petitioner,

against

RICHARD STEPHENS,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondent's brief in opposition is not responsive to the claim of error urged in the petition herein. The claim of error is that the Court of Appeals erred in refusing to construe the words "fraudulent intent" in accordance with the meaning of criminal intent as defined in the New York Penal Law. Respondent's disagreement with petitioner as to the meaning of the New York criminal statute and the decisions thereunder does not alter the fact that the Court of Appeals refused even to consider those New York authorities.

Moreover, even as to the meaning of the New York statute, respondent has summarized petitioner's contentions incorrectly. Respondent characterizes petitioner's claim as being that the New York statute eliminates the intent requirement entirely. This is not correct. Petitioner's contention is only that we must look to the New York statute and the decisions thereunder to determine what the elements of fraudulent or criminal intent are, and that, when we do so, we discover that respondent's admitted intent contained those elements. The issue of law before

the Court of Appeals was not *whether* fraudulent intent must be proved; the issue was *what* the elements of fraudulent intent as defined by the New York courts consist of. Accordingly, respondent's extensive citation (pp. 16-22) of cases for the general proposition that there can be no crime without intent misses the mark entirely.

As demonstrated by the state court decisions cited in the petition (pp. 11-14), intent to enforce a general claim of offset does not under New York law excuse misappropriation of property. On the contrary, such a purpose in and of itself constitutes criminal intent. See, e.g., *Greene* v. *Fankhauser* (1st Dept. 1910) 137 App. Div. 124, 132. In the present case, respondent expressly acknowledged that he misappropriated the monies given him on the expense voucher with the intention of enforcing his general claim of offset against Columbia for personal expenses (App'ee's App. 13-14, 16, 20-21, 39; App'nt's App. 47). Under the New York decisions cited in the petition (pp. 11-14), this was enough to constitute criminal intent. Accordingly, respondent by his own testimony was possessed of an intent which is regarded as criminal by New York law, and there was no issue of fact for the jury.*

Respondent's brief seeks to create the impression that an issue of fact existed as to whether there was an "understanding" by which Columbia consented to the withholding of the monies. The statement in respondent's brief to this effect (p. 4) is unsupported by any record reference and constitutes a bare-faced misrepresentation of the record.

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* Respondent suggests that the issue of intent may never be taken from the jury. This is true only in criminal cases because of the accused's constitutional right not to have a verdict directed against him with respect to any element of the crime. In civil cases, however, the issue of intent may, like any other issue, be taken from the jury under appropriate circumstances. *Buckeye Cotton Oil Co.* v. *Sloane* (6th Cir. 1921), 272 Fed. 615, 623; *Graves* v. *Kaltenbach & Stephens, Inc.* (1st Dept. 1923), 205 App. Div. 110, aff'd on other grounds 237 N. Y. 546.

There was no testimony whatsoever as to any "understanding", and this is borne out by the fact that no reference to any such testimony was made by either the District Judge or the Court of Appeals. On the contrary, both courts treated respondent's wrongful misappropriation of the monies without Columbia's consent as an undisputed fact, and the District Judge so charged the jury (App'nt's App. 109). The case was submitted to the jury only because of the District Court's misapprehension as to the legal significance of respondent's general claim of offset. There was never any suggestion that Columbia had authorized respondent's conduct!

Respondent's "Brief Outline of the Case" and statement of "Facts" contain a number of other misstatements. However, it would be inappropriate at this stage of the proceedings to belabor this Court with a detailed argument concerning the content of the record, especially since respondent's other misstatements do not affect petitioner's claim of error, which, as already stated, is that the Court of Appeals erred in refusing to determine whether respondent's admitted intent was criminal under the New York decisions.

An examination of the cases cited at pp. 19-21 of respondent's brief reveals that they support the contention made in the petition herein that New York recognizes no distinction between fraudulent intent as used in fidelity insurance and criminal intent as defined by the Penal Law. Indeed, respondent himself treats the terms fraudulent intent and criminal intent as interchangeable throughout his brief. Examination of the Court of Appeals' opinion, however, will reveal that it was based upon an attempt to distinguish between those two concepts (140 F. 2d, at pp. 766-767). Clearly, that decision was erroneous, and not even respondent has attempted to sustain the decision on the ground on which it was rendered.

Contrary to respondent's contentions, the action of the Court of Appeals in the instant case presents an appro-

priate subject for review by this Court. The refusal of the Court of Appeals to decide this type of case in accordance with expressed State policy is inconsistent with the firmly established principles often reiterated by this Court governing the role of the Federal judiciary in relation to the States. Indeed, as shown by the statistics set forth in the petition (p. 11), the issue is presented particularly acutely in the present case by reason of the large volume of fidelity insurance outstanding in the State of New York and the very definite policy pronouncements relating thereto which have been made by the New York courts.

Respondent repeatedly adverts to the fact that no formal exception was made to the charge to the jury. The questions now presented, however, were adequately preserved by the motions for a directed verdict and a new trial (App'nt's App. 93, 114), for, apart from its failure to apply New York law in determining whether the issue of fraudulent intent should be submitted to the jury, the District Court recognized that the defense of truth had been established as a matter of law (App'nt's App. 109).

Respondent's brief (p. 2) states that no motion was made to the Court of Appeals for a stay. Respondent neglects to mention that a stay pending final disposition of the case in this Court has been obtained from the District Judge who presided at the trial.

Respectfully submitted,

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